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In the Supreme Court of the United States

October Term 1957
No. 844

CEDAR CREEK OIL AND GAS COMPANY, a corporation; INTERNATIONAL TRUST COMPANY, a corporation; H. C. SMITH; SUSAN M. WRIGHT; and W. B. HANEY,
Petitioners,

vs.

FIDELITY GAS COMPANY, a corporation; MONTANA-DAKOTA UTILITIES COMPANY, a corporation; and SHELL OIL COMPANY, a corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Cedar Creek Oil and Gas Company, a corporation, International Trust Company, a corporation, H. C. Smith, Susan M. Wight and W. B. Haney, petitioners, pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit dated October 22, 1957 affirming the judgment of the United States District Court for the District of Montana.

OPINION BELOW

The order affirming the judgment of the District Court is reported in *249 Fed. 2d 277.*

JURISDICTION

The judgment of the Court of Appeals was entered on the 22nd day of October, 1957, and Petition for Rehearing was denied on December 12, 1957. The jurisdiction of this Court is invoked under *28 U. S. C. A., Section 1245(1).*

QUESTIONS PRESENTED

(1) Whether petitioners are estopped from prosecuting this suit by reason of the fact that this suit to quiet title was not filed until 19 months after they had notice respondents were claiming an interest in their lands.

This principal question raises the following question:

(A) Do respondents bear the burden of proving every element of estoppel? If they do, did they establish by clear and convincing proof:

1. A false representation or concealment by petitioners?

2. Lack of knowledge or the means of knowledge of the facts on the part of respondents?

3. That a false representation was made by petitioners or that the petitioners concealed the facts with the intention that respondents should act upon a false representation or concealment?

4. That the respondents relied upon a false representation or concealment? and

5. That respondents acted to their prejudice

upon the basis of a false representation or concealment of facts by petitioners?

(2) Was testimony showing the circumstances under which the contract upon which respondents found their claim properly excluded?

(3) Had the underlying oil and gas lease involved expired by its own terms?

STATUTES INVOLVED

Section 93-1301-6, Revised Codes of Montana, 1947, Subsection 3:

> "3. Whenever a party has by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it."

Section 93-2504, R. C. M. 1947, as amended:

> "No action for the recovery of real property, or for the possession thereof, can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within five (5) years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten (10) years after the death of her husband."

STATEMENT OF FACTS

The District Court had jurisdiction because there is diversity of citizenship and the amount in litigation exceeds $3,000.00. *28 U. S. C. 1332.*

The action was filed in the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Fallon on December 3, 1952. The cause was removed to the United States District Court of the District of Montana. An Amended Complaint was filed in that Court on February 3, 1953.

The action is one in the statutory form as prescribed by the Montana Statutes, to quiet title to certain oil leases and lands in Fallon County, Montana. Each petitioner holds one or more government or fee leases on the lands involved. Two causes of action are stated for each petitioner.

By their answers, respondents claim an interest under certain leases referred to as Operating Agreements, (Def. Ex. 2) reprinted in part in the Appendix, and under certain Unit Agreements and Gas Purchase Contracts.

The reply of petitioners alleges that the Operating Agreements have expired by their own terms by reason of the failure of respondent Fidelity Gas Company to exercise its option to keep the lease alive by drilling further wells within a reasonable time after completion of drilling three wells prior to December 1, 1938. Additionally, by their reply, petitioners allege that respondent Fidelity abandoned its right under the agreements, that if the agreements did not terminate by their own terms and if they were not abandoned, Fidelity's rights were terminated because it was the duty of the

respondent Fidelity to diligently and within a reasonable time continue exploration, which it did not do, and finally that the respondents are estopped to claim under the agreements.

The question on the merits is whether the Operating Agreements remained in force, and voluminous testimony was introduced in support of petitioners' complaint, the chief contention of the petitioners being that the lease was an option, which the District Court held to be true, and that the respondents failed to exercise the option in the manner or within the time provided by the Operating Agreements.

Trial in the District Court of the District of Montana resulted in judgment for the respondents. (R. 204) The District Court based its judgment on a finding that petitioners were estopped to question the continuing validity of the Operating Agreements. (R. 195-198-200).

Upon appeal, the Court of Appeals of the Ninth Circuit affirmed. (R. 755) In addition to affirming the District Court's findings that petitioners were estopped from prosecuting their suit, the Court of Appeals held that petitioners had failed to prove that the Operating Agreements had expired.

The Cedar Creek Anticline is a geological structure in eastern Montana in the shape of a long narrow oval, the length being approximately 65 miles. The lands and leases of the petitioners are approximately in the center of the oval. Prior to 1934, gas

in commercial quantities was discovered on the Anticline. A large number of gas wells were drilled, many on the public domain. The testimony of petitioners and their predecessors is that a predecessor of respondent Montana-Dakota constructed a pipeline in the early 30's and started to market gas from lands it controlled, with the result that lands and leases now held by the petitioners were being drained and the Secretary of the Interior was requiring petitioners and their predecessors to pay compensatory royalties, that is, royalties based on the theory that government gas was being drained from the lands.

This placed an onerous financial burden upon the land and lease holders and they were forced to enter into agreements for the unit operation of the gas deposits, contracts for the sale of their gas, and the Operating Agreements referred to above in order to save their leases, even though the terms of the Unit Agreements, Gas Purchase Agreements and the Operating Agreements were most unfavorable to the land and lease owners. The various agreements were executed in the main in 1934 and 1935.

Under the terms of the Operating Agreements, respondent Fidelity Gas, a wholly owned subsidiary of respondent Montana-Dakota Utilities Company, agreed to commence the drilling of a well somewhere on the anticline within one year of the execution of the agreement. If the test well failed to encounter commercial production, Fidelity had the

option to drill additional test wells. In the event the test well encountered commercial production, then Fidelity was obligated to commence drilling another well within one year and to continue to drill development wells. (Appendix 48) The District Court held that if the first well were dry, there was no obligation on the part of Fidelity to drill further wells and that unless it drilled further wells under the terms of the option, the lease automatically expired.

Three non-commercial test wells were drilled by Fidelity between 1935 and 1938. The Trial Court found that the first drilled was the test well required by the Operating Agreement and the other two were drilled to exercise the option to continue the lease in force. (R. 193) In May 1941, an additional well was commenced by the Carter Oil Company under an agreement with Fidelity some 25 miles south of petitioners' lands on the anticline. This proved to be a dry well. Nothing further was done until May, 1949 when Husky Refining Company under an agreement with Fidelity drilled another dry hole in the same area. The District Court did not rule on whether the drilling of the Carter well in 1941 and the Husky well in 1949 constituted timely exercise of the option but ruled that if the cause were reversed the case should be reopened for the taking of additional testimony on whether the drilling was timely.

On April 10, 1951, Montana-Dakota and Fidelity made an agreement with Shell under which Shell

undertook to carry on the program contemplated by the Operating Agreement for the development of the Cedar Creek Anticline, including the lands and interests of petitioners. On July 8, 1951, Shell commenced drilling a well some 25 miles north of the lands with which this suit is concerned. At the time the suit was filed, Shell had commenced or drilled eleven wells on the anticline. Of these, eight were 25 miles and more northwest of the lands and leases of the petitioners and two were some 30 miles south and east of the said lands and leases. Three weeks before the filing of the suit, Shell commenced the drilling of a well approximately 11 miles north and west of the lands involved. At the time of the filing of the suit, that was the closest drilling by Shell.

Prior to 1939, Fidelity had made frequent reports of progress under the Operating Agreement, the last of such reports being dated November, 1938. From that date to April 27, 1951, neither Fidelity nor Montana-Dakota made any reports nor did they by any overt act indicate to petitioners or their predecessors that they were claiming that the Operating Agreements were still in effect. On the latter date, after the agreement with Shell had been made, Fidelity and Montana-Dakota Utilities by letter advised the petitioners of the making of the agreement of April 10, 1951. The letter advised petitioners that Shell proposed to enter into a drilling and exploration program on the anticline.

On July 16, 1951, petitioner H. C. Smith, who is the holder of the largest block of acreage here involved sent a notice to Fidelity and Montana-Dakota claiming that the Operating Agreements had expired. A similar notice was sent by petitioner Cedar Creek on September 12, 1952, again only to Fidelity and Montana-Dakota.

Additionally, there is testimony undisputed that in 1951, or early 1952, an agent of Shell sought to lease the lands involved from one John Wight, as agent for petitioners. Other uncontradicted testimony was introduced negativing concealment or misrepresentation and showing actual knowledge on the part of the respondents that petitioners were claiming the Operating Agreements had expired. Respondents introduced no direct testimony to establish concealment, misrepresentation, lack of knowledge on their part or reliance upon any conduct of petitioners. The District Court held respondents estopped to claim the Operating Agreements terminated and entered judgment for respondents, and the Court of Appeals, holding that the facts of reliance may be proved by circumstantial evidence, sustained the District Court because it concluded that the circumstantial evidence tended to prove the elements of the estoppel.

SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals for the Ninth Circuit erred: (1) In holding that petitioners were estopped; (2)

In failing to reverse the holding of the District Court that evidence as to the circumstances under which the Operating Agreements were negotiated was not admissable; (3) In holding that petitioners had failed to establish that the Operating Agreements, in fact, had expired; (4) In failing to remand with directions to enter judgment for petitioners.

REASONS FOR GRANTING THE WRIT

(1) The decision denies to petitioners the right to a decision on the merits by the application of the doctrine of estoppel where no impelling reasons support its application and where no single element of estoppel has been proven.

(2) The rule is universal that estoppels are odious and must be proven clearly, convincingly and satisfactorily. *Fiers vs. Jacobson*, 123 Mont. 242, 250, 11 Pac. 2d 968. The decision itself reveals that there is no testimony clear, convincing or satisfactory, either direct or circumstantial to establish any of the five required elements of an estoppel.

(3) The decision conflicts with applicable decisions of the Supreme Court of the United States, particularly the decision in *Sauder vs. Midcontinent Petroleum Company*, 292 U. S. 272. The decision is also in conflict with *Hammond vs. Hopkins*, 143 U. S. 224; *Johnston vs. Standard Mining Company*,

148 U. S. 360; *Patterson vs. Hewitt*, 195 U. S. 309; *Twinlick Oil Company vs. Marberry*, 91 U. S. 587.

(4) The decision is in conflict with other decisions of the Ninth Circuit. *City of Roswell vs. Mountain States Telephone and Telegraph Company*, 78 Fed. 2d 379; *Gillons vs. Shell Oil Company*, 86 Fed. 2d 600.

(5) The decision is in conflict with the decisions of other Circuits. *Brewster vs. Lanyon Zinc Company*, 140 Fed. 801, 809, 72 C. C. A. 213; *Medallion Oil Company vs. Hinkley*, 92 Fed. 2d 155; *Wenn vs. Sugart*, 112 Fed. 2d 617; *Buchler vs. Black*, 226 Fed. 703.

(6) The decision is in conflict with decisions of the Supreme Court of the State of Montana. *Fiers vs. Jacobson*, 123 Mont. 242, 250, 11 Pac. 2d 968; *Gerard vs. Sanner*, 110 Mont. 71, 80, 103 Pac. 2d 314; *Waddell vs. School District No. 2*, 74 Mont. 91, 96, 238 Pac. 884; *Bowes vs. Republic Oil Company*, 78 Mont. 134, 252 Pac. 800.

(7) The decision is in conflict with the universally accepted rules as to the burden of proof as to estoppels. *Gypsy Oil Company vs. Marsh*, Oklahoma, 248 Pac. 329, 48 A. L. R. 867, 886; *Thorpe vs. Lemire*, 264 Wis. 220, 58 N. W. 2d 641, 44 A. L. R. 2d 189, 195.

The Writ should be granted because the decision marks an important departure from the accepted rules on the application of the doctrine of estoppel in the following particulars:

a. It shifts the burden of proof to the one against whom the estoppel is sought;

b. It ignores the rule that estoppels are odious and are to be applied for only the most impelling reasons;

c. It is contrary to the universally accepted rule that all of the elements of the estoppel must be proven;

d. It holds that a delay of less than three months in giving notice of the claim of the petitioners that the agreement involved had expired is sufficient to create an estoppel;

e. The decision, so far conflicts with the decision of this Court and the Courts of the other circuits and of the Appellate Courts of the states as to create confusion and conflict on a most important question of practice, that is, the application of the doctrine of estoppel;

f. The application of the doctrine of estoppel under the undisputed facts present is inequitable and unjust to petitioners and constitutes an unjust enrichment of respondents;

(8) The Writ should be granted for the further reason that under the decision respondents Montana-Dakota Utilities and Fidelity Gas Company will have held petitioners' lands and leases for 13 years without the expenditure of one cent for exploration, drilling and development or the payment of rentals and without the drilling of any well within the 30 miles of the lands of the petitioners, a

result condemned by this Court in *Sauder vs. Mid-Continent Petroleum Company*, 292 U. S. 272.

(9) The Writ should be granted for the further reason that the provisions of the Operating Agreement, (Appendix 48) limit the time within which further drilling may be performed to exercise the option to keep the agreement alive to 18 months, and the record and the decision show the option was not timely exercised. If there is ambiguity in paragraphs 3 and 4 of the Operating Agreements, (Appendix 48), then the Trial Court was in error in excluding proffered testimony as to the circumstances under which the agreements were executed and the cause should be remanded for further proceedings.

DISCUSSION

The basic facts upon the question of estoppel are simple and undisputed. Respondents introduced no direct evidence in proof of their plea of estoppel and the decision of the Trial Court and of the Court of Appeals required a disregard of direct undisputed and accepted testimony showing there was no estoppel and acceptance of circumstantial evidence entirely to furnish the proof of facts requiring application of the doctrine by testimony clear, convincing and satisfactory.

From January 1939 until April 27, 1951, the uncontradicted testimony is that no respondent indicated to any petitioners that any respondents

claimed the Operating Agreements had not expired. There was no proof that drilling by Carter and Husky some 30 miles south of the lands involved was claimed by any respondent at the time to have been pursuant to the Operating Agreements, and no notice was given any petitioner that any respondent claimed that it was. During that 13 year period, it is undisputed that petitioners were of the belief that the Operating Agreements had expired by their own terms and by abandonment by respondent. The first notice that respondents, or any of them, claimed the Operating Agreements were still in effect was the letter of April 27, 1951. (R. 375). On July 16, 1951, petitioner H. C. Smith, the holder of the larger block of the acreage here involved, addressed a letter to respondent Montana-Dakota and Fidelity asserting that the agreement had expired. (R. 387). Montana-Dakota answered Smith's notice by a letter dated August 9, 1951. (R. 387). The letter carries the notation at the bottom that a copy was sent to respondent Shell. This was dated 8 days after Shell had commenced drilling its first well. That well was located more than 25 miles from any of the lands here involved. Shell was required to drill that well under its agreement with Montana-Dakota and Fidelity, whether the title of Fidelity to any lands on the anticline was good or not. The delay in giving the notice thus was two and one half months. The delay was not unreasonable and does not support the finding of

the estoppel. The decision is in conflict with prior decisions of the Court of Appeals for the Ninth Circuit, particularly the decision in *City of Roswell vs. Mountain States Telephone and Telegraph Company*, 78 Fed. 2d 379; *Gillons vs. Shell Oil Company*, 86 Fed. 2d 600 and *Della Lamar Mines of Montana vs. Mackey*, 104 Fed. 2d 271. It is in conflict with decisions of this Court. *Hammond vs. Hopkins*, 143 U. S. 224, 36 L. Ed. 134; *Patterson vs. Hewitt*, 195 U. S. 309, 49 L. Ed. 214; *Twin Lick Oil Company vs. Marberry*, 91 U. S. 587, 23 L. Ed. 328. It is in conflict on this point with the decision in *Bowes vs. Republic Oil Company*, 78 Mont. 134, 143, 252 Pac. 800.

Estoppels are odious and are not favored, should be proven clearly, convincingly and satisfactorily, and the burden is on the party relying upon the estoppel to prove the essential elements of the estoppel. Every element of the estoppel must be clearly and satisfactorily proved, and where the evidence is evenly balanced, the burden of proof is not sustained. Estoppels cannot be based upon mere conjecture and facts alleged to constitute them may not be taken by argument, inference or intendment. *Fiers vs. Jacobson*, 123 Mont. 242, 252, 11 Pac. 2d 968; *Gerard vs. Sanner*, 110 Mont. 71, 80, 103 Pac. 2d 314; *Waddell vs. School District No. 2*, 74 Mont. 91, 96, 238 Pac. 884; *Gypsy Oil Company vs. Marsh*, Oklahoma, 248 Pac. 329; 48 A. L. R. 876, 886. The decision of the Court of Appeals acknowl-

edges that these principles control, but a reading of the opinion alone demonstrates that in order to reach the conclusion that petitioners are estopped, these principles had to be and were ignored:

A. There were no impelling reasons for applying the doctrine. Petitioner Smith had put respondents upon notice within two and one half months of the time any petitioner had knowledge of respondent's claim. The notice was given 8 days after Shell began drilling its first well, and that well was 25 miles and more from the lands here involved. All of the equities favor the petitioners. The effect of the application of the doctrine is to give life to agreements that had expired in 1940. The result of the application of the doctrine is a determination that the lands and leases of petitioners have been burdened by an onerous, profitless lease for 13 years, and during all of that period petitioners believed the agreements to have expired. On this point the decision conflicts directly with *Sauder vs. Midcontinent Petroleum Company*, 292 U. S. 272.

B. The burden of proving every essential element of the estoppel is on respondents. The Court of Appeals could affirm only as stated in its opinion by finding that proof of each of the essential elements was sufficiently established by circumstantial evidence. The record shows direct evidence as to each point was available and no explanation was given why direct evidence was not introduced. Neither the circumstantial evidence nor any other

supports the finding that petitioners are estopped.

(1) The Trial Court found that petitioners remained silent and made no claim that the Operating Agreements had expired or had been terminated until February 2, 1953. (Record 197). This finding was affirmed in the opinion of the Court of Appeals. (Appendix 37). The finding is directly contrary to the evidence. It is in direct conflict with the statements in the opinion that H. C. Smith sent the notice of July 16, 1951. (R. 397). Note 5 to the opinion directly contradicts the statement in the opinion that there is no indication Shell received the H. C. Smith notice. (Appendix 36.)

The Trial Court found that no notice was given of petitioner's claim until the value of petitioners' interests had been greatly enhanced and the oil producing possibilities of their properties were demonstrated. The H. C. Smith notice was mailed 8 days after the first well was spudded in by Shell, that well being more than 25 miles from the properties here involved. When the suit was filed, no drilling had occurred on petitioners' lands, nor within eleven miles of them.

2. There cannot be an estoppel without proof clear, convincing and satisfactory that petitioners misrepresented or concealed their claim with the intent to deceive respondents. *Waddell vs. School District No. 2*, supra. Whether the H. C. Smith letter was received by Shell and was effective as notice, and whether the Gadbois conversation referred to

in the opinion, (Appendix 34) occurred in 1951 or 1952, the letter and conversation are totally inconsistent with an intent on the part of the petitioners to conceal their claim, and the conclusion of an intent to conceal can be arrived at only by disregard of the principles applicable to estoppels and by a total disregard of the evidence.

3. Respondents had the burden of proving affirmatively by evidence clear and convincing that they had no knowledge of the claim of petitioners that the Fidelity Agreements were dead. *Waddell vs. School District,* supra. The Trial Court made no finding that respondents lacked actual knowledge of petitioners' claim, but the Court of Appeals assumed an implied finding of lack of knowledge. (Appendix 39). It is on this point, particularly that the opinion shows the degree to which the burden of proof was shifted to petitioners. It makes no difference whether petitioners sent a notice of their claim, whether it was received, or whether petitioners acted with an intent to deceive respondent, if respondents had actual knowledge of petitioners' claim. They might have secured that knowledge from sources not even known to petitioners. They might have learned of petitioners' claim from persons to whom petitioners had offered to lease the land. Under the principles stated, the burden of proof was on respondents to show lack of knowledge by testimony clear, convincing and satisfactory. No such evidence appears, and any finding of

lack of knowledge is contrary to the evidence, direct, positive and uncontradicted. The H. C. Smith letter of July 16, 1951, gave actual notice as to Smith's claim and put all respondents on notice of the position of the whole Wight group. A finding that Shell did not have actual knowledge, in view of the notation on the letter from Montana-Dakota *Utilities to* H. C. Smith of August 9, 1951, and Note 5 to the opinion, (Appendix 36) demonstrates that a finding that Shell had no actual knowledge is contrary to the direct evident, and is based upon mere conjection contrary to the rule as stated in *31 C. J. S. 457.*

4. There must be evidence clear, satisfactory and convincing that petitioners intended respondents to take action which would not otherwise be taken. *Texas Company vs. Pettit,* 107 Okla. 243, 220 Pac. 956. There is no testimony circumstantial or otherwise to discharge respondents' burden on this point. Under Shell's agreement with Montana-Dakota and Fidelity, it had an absolute obligation to drill the well that it commenced prior to the receipt of the H. C. Smith letter of July 16, 1951. Had petitioners intended Shell to do drilling and development work, which it was not obligated to do by its agreement with Montana-Dakota Utilities and Fidelity, would Smith have sent the letter of July 16, 1951? The question answers itself. The Court of Appeals held proof of the intention of petitioners to induce respondents to take an action it would not

otherwise have taken except for the misrepresentation or concealment may be proven by circumstantial evidence, citing *Lacy vs. Wozencraft,* 188 Okla. 19, 195 Pac. 2d 781. (Appendix 39). The circumstances furnish no support for the Court's conclusion. The letter of April 27, 1951, stated the terms of the agreement under which Shell was to proceed. To suggest that a notice of claim in view of the acreage here involved and the stated location of the first well to be drilled more than 25 miles north of the lands here involved, would stop the program is ridiculous. Three weeks before the suit was brought, Shell commenced the drilling of a well approximately 11 miles north and west of the lands involved. Petitioners moved promptly and in ample time to warn Shell that it should not spend money on or in the vicinity of petitioners' lands in reliance on a belief that the Operating Agreements were still in effect.

5. Respondents did not discharge the burden of proving by evidence clear, convincing and satisfactory that they relied upon any misrepresentation or concealment of petitioners' claim. Once again the Court of Appeals found sufficient proof of the final element of an estoppel by circumstantial evidence. As we have pointed out heretofore, Shell obligated itself to drill the only well it commenced prior to the H. C. Smith letter, and as to the drilling of that well, there can be no claim of reliance. Wells drilled after that were drilled with the knowledge of

petitioners' claims and particularly that of H. C. Smith that the Operating Agreements had terminated. If it were concluded that Shell is not chargeable with receipt of the Montana-Dakota Utility letter of August 9, 1951, there is not circumstantial evidence sufficient to prove that the other ten wells spudded in or drilled before the bringing of the suit were spudded in or drilled in reliance upon petitioners' silence. Eight of those wells were 25 miles or more northwest of the lands involved and two were some 30 miles south and east of the lands involved. One was eleven miles north and west of these lands. In the light of the agreement between Shell and the other two respondents, and the location of the drilling, the facts are as consistent with non-reliance as with reliance and, therefore, are not proven by the circumstantial evidence. *U. S. vs. Hollins*, CCA Calif. 111 Fed. 2d 949.

Petitioners believe that study of the opinion alone is sufficient to move the Court to grant the Writ, and for that reason the discussion has been directed primarily to the facts with relation to estoppel set out in the opinion. A study of the record will reveal other direct, positive, uncontradicted testimony which even if petitioners had the burden of sustaining the negative, establish that:

1. Respondents had actual notice of petitioners' claims long prior to the time the suit was filed;

2. Petitioners had no intent to conceal, misrepresent or deceive respondents;

3. Petitioners had no intent that respondents should act on any action or non-action of theirs with relation to their claims the Operating Agreements were dead;

4. Respondents relied on no belief that petitioners were not claiming the Operating Agreements to be dead.

If the decision is allowed to stand, it will rise to plague this and all other Courts and its application to estoppel will result in great injustice and damage to these petitioners and all other similarly situated.

C. The decision is in conflict with that in *Sauder vs. Mid Continent Petroleum Company*, 292 U. S. 272, supra. In facts strikingly similar to the facts here, this Court granted certiorari. Two wells were drilled on the lands there involved. The Petroleum Corporation had drilled no further wells for 17 years and was attempting to continue to hold the leases on the undrilled portion of the lands. This Court cancelled the lease and used the following language which we here quote because of its exact applicability to the facts here:

> "The production of oil on a small portion of the leased tract cannot justify the lessee's holding the balance indefinitely and depriving the lessor, not only of the expected royalty from production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral content of the land."

[illegible] well was drilled on these lands in 1938. No well has been drilled by respondents

within eleven miles of the lands from that date to the date this suit was brought, a period of 15 years. Montana-Dakota and Fidelity have spent not one cent since 1939 to explore, drill or develop deep wells on the whole anticline and their whole purpose has been to hold the lands indefinitely with no expenditure on their part, in the hopes of peddling it, at a handsome profit to themselves, which purpose will have been realized if this decision stands.

D. The Trial Court, after finding the Operating Agreements to be leases in the nature of options, held it could not conclude whether the Operating Agreement had expired by their own terms. (R. 200). In its memorandum, the Trial Court held that if the cause were not determined on other grounds, it should be reopened for the taking of further testimony as to whether the option had been exercised within time. (R. 176). The Court of Appeals held petitioners had failed to prove that the lease had expired under its own terms. (Appendix 44). Both rulings are clearly erroneous on the basis of the applicable provisions of the Agreement, and under the decision of *Sauder v. Midcontinent Petroleum*, supra and *Brewster vs. Lanyon Zinc Co.*, 140 Fed. 801, *Berthelotte vs. Loy Oil Co.*, 95 Mont. 434, 445, 28 Pac. 2d 187.

A reading of the Operating Agreement shows that reference to good field practice refers to time of drilling within the maximum 18 months' period allowed for the exercise of the option by further

drilling after the drilling of a deep hole. If this is not so, then the language is doubtful and the Trial Court errer in not admitting testimony as to the circumstances under which the Operating Agreements were executed. *Ming vs. Pratt*, 22 Mont. 262, 36 Pac. 279; *Brown vs. Homestake Exploration Company*, 98 Mont. 305, 39 Pac. 2d 168.

CONCLUSION

It is respectfully submitted that this Petition for Certiorari should be granted.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR CREEK OIL AND GAS COMPANY, a corporation, INTERNATIONAL TRUST COMPANY, a corporation, H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY, *Appellants,* vs. FIDELITY GAS COMPANY, a corporation, MONTANA-DAKOTA UTILITIES COMPANY, a corporation, and SHELL OIL COMPANY, a corporation, *Appellees.*	No. 15,293 Oct. 22, 1957

Appeal from the United States District Court for the District of Montana, Billings Division

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Before: Healy, Fee, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

This is an action to quiet title to certain oil leases and lands in Fallon county, Montana. It was brought by Cedar Creek Oil and Gas Company, Mondakota Gas Company, International Trust Company, Susan M. Wight, H. C. Smith, and W. B. Haney. Each of these plaintiffs holds one or more government permits and leases, or fee leases, on certain tracts involved in this suit. The complaint

states two causes of action as to each plaintiff, making twelve causes of action in all.

The defendants are Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company. Their claimed rights under a series of oil exploration, drilling, and production agreements constitute the cloud upon plaintiffs' title which is sought to be removed.

After a trial to the court without a jury, findings of fact and conclusions of law favorable to defendants were made and entered. In the judgment which was then entered, it was decreed that the agreements upon which defendants rely are valid, subsisting, and in full force and effect. It was further adjudicated that plaintiffs hold their respective interests in the described tracts subject to such agreements. Plaintiffs appeal.[1]

It was not questioned at the trial, and is not questioned here, that, if the agreements upon which appellees rely are in full force and effect, appellants could not prevail in the action. It is appellants' position that those agreements have expired by their own terms, or have been abandoned. Appellees dispute these contentions. They also argue that,

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[1]The third and fourth causes of action, in which Mondakota Gas Company was named plaintiff, were dismissed by stipulation. Further reference to "plaintiffs" herein will not include Mondakota.

[2]Appellees, asserting that appellants' notice of appeal was given too late, raised the question of this court's jurisdiction in a motion to dismiss the appeal. The motion was denied. 238 F. (2d) 298. Appellees have now invited us to re-examine this matter in the light of the recent case of F. & M. Schaefer Brewing Co. v. United States (2 Cir.), 236 F. (2d) 880, in which certiorari has been granted. 353 U. S. 901. Our reading of Schaefer does not convince us that this appeal should be dismissed.

in any event, appellants are precluded, by reason of estoppel, laches, or waiver, from obtaining relief in this action.

The trial court held for appellees on the grounds of estoppel, laches, and waiver, and so did not reach the merits of the controversy. Asserting that the trial court erred in so ruling, appellants contend that appellees did not sustain the burden of proving all of the essential elements of estoppel, laches, or waiver.

We turn first to the question of estoppel, which the trial court emphasized in its memorandum opinion.

The facts pertinent to this defense, substantially as found by the trial court, are as follows: The lands here involved are situated upon a geological formation known as the Cedar Creek Anticline, which comprises a great number of acres. During 1934 and 1935, ninety per cent of the owners of the affected oil and gas working or operating interests, including all of appellants or their predecessors in title, entered into agreements for a cooperative or unit plan of development of the anticline. These agreements were entered into with Gas Development Company, predecessor to appellee Montana-Dakota Utilities Company. The lands and leases of appellants are located in what is known as Unit 5 in this unit plan.*

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*For the purposes of this action, appellant Susan M. Wight disclaimed all interest in the only portion of the lands described in the complaint which was not within Unit 5.

The unit plan agreements apply primarily to the development, production, and marketing of natural gas from upper sands known as the Judith River Sand. Under the agreements, however, Gas Development Company was given the right to commit all the interests of the signatories to the agreements, including their interest in the oil and gas below the Judith River Sand, to any similar unit plan of operation approved by the Secretary of the Interior.

At approximately the same time that the unit plan of development was entered into, appellants or their predecessors entered into gas purchase agreements with Montana-Dakota Utilities Company, or its predecessor. At about the same time, they also entered into so-called operating agreements with Fidelity Gas Company, a wholly-owned subsidiary of Montana-Dakota Utilities Company. For the purpose of this suit, the interest which appellees presently assert in the lands in question is based primarily upon these Fidelity operating agreements. On this appeal, our attention is accordingly directed primarily to these agreements.

Except as to dates, land descriptions, and parties involved, all of the Fidelity operating agreements are identical. They grant and sublease to Fidelity, as operator, the oil and gas working rights of appellants. The purpose of the agreements is to set up a cooperative exploratory and development program on the entire Cedar Creek Anticline, as a structural entity, in horizons below two thousand feet.

Under the terms of the Fidelity operating agreements, Fidelity was bound to commence drilling a test well somewhere on the anticline within one year after the execution of certain operating agreements. In the event the well so drilled failed to encounter commercial production, Fidelity had the option to drill additional test wells

> ". . . under like terms and conditions and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having due regard to weather and road conditions."

In the event oil of commercial quality and in paying quantities was encountered in the first or any subsequent test well drilled under the Fidelity operating agreement, Fidelity had a definite obligation to continue drilling. It was then obliged to commence the drilling of an additional well or wells within one year from the completion of the first commercial well, and so on, with the purpose of progressively extending the production limits of the anticline toward and upon the lands covered by each Fidelity operating agreement.

Between 1935 and 1938, Fidelity drilled three noncommercial test wells on the anticline. Appellants conceded at the trial, and the court found, that these activities constituted compliance with Fidelity's initial obligation to drill a test well. The last of these wells was abandoned as noncommercial in July or August, 1938.

No additional drilling was done by Fidelity or anyone on its behalf until May, 1941. From September, 1935, through January, 1939, however, Fidelity carried on negotiations with The California Company, with the view of having that company carry forward the program specified in the Fidelity operating agreements. The California Company conducted a geophysical survey of part of the area, but concluded negotiations and rejected all proposals in January, 1939. Fidelity then entered into negotiations of the same kind with The Carter Oil Company, but limited to Units 8A and 8B. An agreement between Fidelity and Carter was executed in 1940, under which Carter commenced drilling a well within the anticline on May 12, 1941. This proved to be a dry well, and was plugged on January 8, 1942.

There was no more drilling under the Fidelity operating agreements until 1949. During this period, the defense demands of World War II made it difficult to obtain drilling materials. Steel could be obtained only where it could be shown that the drill pipe and well casing would be used in developing established productive fields near available marketing facilities. During 1947, however, Fidelity entered into negotiations with certain parties looking to further development of the anticline. These negotiations resulted in a contract with Husky Refining Company, executed in 1948, under which Husky was to carry forward the anticline

development program in Units 8A and 8B. In May, 1949, Husky commenced drilling a well in this area. This was completed as a dry hole in July, 1949.

Early in 1950, Montana-Dakota and Fidelity entered into negotiations with Shell culminating in an agreement executed on April 10, 1951. Under this agreement, Shell undertook to carry on the program contemplated by the Fidelity operating agreements for the development of the Cedar Creek Anticline, including the lands and interests of appellants.

Pursuant to the terms of this agreement, Shell carried on extensive geological and geophysical surveys of the anticline. On July 8, 1951, Shell commenced drilling a well. In January, 1952, this well was completed as the first deep test well on the structure capable of producing oil in commercial quantities. Since then, and prior to the trial in April, 1955, Shell has made commercial discoveries of oil to the north and south of the lands in which appellants have an interest. During this period, Shell has drilled fifty-three wells within the anticline, and has expended approximately twelve million dollars in conducting the program contemplated by the Fidelity operating agreements. Eleven of these wells were started prior to the time this suit was commenced. These wells alone cost Shell well over three million dollars.

On April 27, 1951, Fidelity and Montana-Dakota by letter advised all of the appellants of the making

of the April 10, 1951, agreement with Shell. In this letter, appellants were also advised of Shell's proposed operations under this agreement. Appellants, howveer, except to the extent noted below, remained silent and made no claim that the Fidelity operating agreements had expired or been terminated, until the filing of this action on February 2, 1953. Action filed in December, 1952.

All of the development and other activities carried on by appellees were performed in reliance on the fact that the Fidelity operating agreements, covering appellants' interests and other similar interests on the anticline, were valid, subsisting, and in fuli force and effect. As a result of the development and other activities of appellees, the values of the oil and gas interests on the Cedar Creek Anticline, including the interests of appellants, were greatly enhanced.

The lands in which appellants have an interest are located near the center of the Cedar Creek Anticline. If the relief prayed for in appellants' complaint is granted, the future development of the area, as planned and carried forward by Shell, will be impaired, and the benefit to be derived by appellees from such development of appellants' lands will be lost.

Based upon these findings, the court concluded, as noted above, that each of the appellants is estopped from obtaining judgment in its favor in this cause.

Appellants call attention to the opinion in Gypsy Oil Co. v. Marsh, 121 Okla. 135, 248 Pac 329, as containing a concise statement of the essential elements of an estoppel. In this case, it is stated, quoting from Texas Co. v. Pettit, 107 Okla. 243, 220 Pac. 956:

> "'The essential elements of an "equitable estoppel" are: First, there must be a false representation or concealment of facts. Second, it must have been made with knowledge, actual or constructive, of the real facts. Third, the party to whom it was made must have been without knowledge, or the means of knowledge of the real facts. Fourth, it must have been made with the intention that it should be acted up. Fifth, the party to whom it was made must have relied on or acted upon it to his prejudice. . . .'"

Under the findings of fact summarized above, each of these five elements was expressly, or by necessary implication, found to be present in this case. It follows that the findings of fact support the trial court's conclusion that appellants are barred by estoppel.

Appellants argue, however, that with respect to each of these elements, the findings of fact are clearly erroneous.

If appellants are correct as to any one of these elements of estoppel, the judgment cannot stand, since all five elements must be found to exist. Gerard v. Sanner, 110 Mont. 71, 103 P. (2d) 314. The burden of proving each of these elements is

(See, also, Waddell v. Sch. of District No. 2, 74 Mont. 91, 238 Pac. 884.

upon appellees (Waddell v. School District No. 2, supra), and such proof must be by clear, convincing and satisfactory evidence. Fiers v. Jacobson, 123 Mont. 242, 211 P. (2d) 968.

The first of these elements of estoppel is that there must have been a false representation or concealment of facts. Appellees contend, and the trial court found, that this element is present because appellants concealed from Shell the fact that they were claiming that the Fidelity operating agreements had expired or had been abandoned.

Appellants argue that the evidence does not support a finding that they concealed their claims. Our attention is called to the testimony of John Wight, concerning conversations he had in 1951 or early 1952 with one Gadbois, an agent of Shell. Wight testified that, in the course of these conversations, he offered to arrange a lease of appellants' lands to Shell. The significance of such an offer is that it would indicate to Gadbois that Wight, who seemed to be representing some of the appellants, considered the Fidelity operating agreements no longer in effect. Gadbois was not called as a witness by Appellees to dispute Wight's testimony. Citing McCormick on Evidence, 534, appellants ask us to infer, from the failure to call Gadbois as a witness, that his testimony would have been unfavorable to appellees. Wight's undisputed testimony, it is contended, refutes any suggestion of concealment by appellants concerning the existence of their claims.

The trial court apparently found Wight's testimony unconvincing. Our own examination of the record indicates to us that Wight was vague in his recollections, and uncertain as to when and how many times these conversations occurred, and who participated. Under these circumstances, the failure to produce Gadbois as a witness is not significant. We are unable to conclude that the trial court erred in disregarding Wight's testimony.

Appellants further assert, however, that the finding as to concealment is negatived by evidence showing that appellant Susan Wight sent a notice of cancellation sometime in 1950; that appellant H. C. Smith sent a notice of cancellation on July 16, 1951; and that appellant Cedar Creek Oil and Gas Company sent written notice of its claim on September 12, 1952.

The Susan Wight notice purports to cancel one paragraph of the gas unit agreement. It had nothing to do with the Fidelity operating agreement. Moreover, it was directed only to Montana-Dakota Utilities Company.

In his communication of July 16, 1951, Smith declared forfeit and canceled any interests claimed by virtue of operating agreements which might apply to lands and leases described in the letter. By this time, Shell had already commenced drilling its first well under the agreement of April 10, 1951. Smith sent his letter to Fidelity and Montana-Dakota. There is no indication that a copy of this letter was

sent to Sheli, although Smith was aware of Shell's interest.* It was Shell was was entitled to be informed as to appellants' claims, since Shell was carrying on the active work of developing the anticline. Notice to Fidelity and Montana-Dakota was not notice to Shell.

As in the case of the Smith notice, the Cedar Creek notice of September 12, 1952, was not sent to Shell, but only to Fidelity and Montana-Dakota. In any event, this notice was not placed in the mail until well over a year after Cedar Creek had learned of the Shell agreement. By that time, Shell had expended a substantial sum of money, a number of successful wells had been completed by Shell, and the lands and leases of appellants had been greatly enhanced in value.

Appellants cite Bowes v. Republic Oil Company, 78 Mont. 134, 252 Pac. 800, for the proposition that they had no duty to advise Shell of their claims unless and until Shell began drilling on their Unit 5 lands. Up to the time of trial, Shell had done no drilling on those lands.

In the Bowes case, however, the court made clear the fact that the holding is not based upon the location of the oil operations, but on the lack of all the necessary elements of estoppel. Moreover, in our case, the lands on which Shell drilled, while held

*Montana-Dakota answered Smith's cancellation notice by a letter dated August 9, 1951. This letter carries the notation at the bottom that a copy was to be sent to Shell Oil Company, Mr. Armin Johnson. The record is silent as to whether this was actually done.

under other permits and leases, were part of a single geological structure which embraced appellants' lands, all of which were included in one comprehensive development plan. In addition, while Shell had not drilled any wells in Unit 5, part of its preliminary geophysical work was performed in that area.

We hold that the finding of fact to the effect that appellants, having received notice shortly after April 27, 1951, of Shell's undertaking to proceed under the Fidelity operating agreements, concealed from Shell, until this action was filed on February 2, 1953, their claims that the operating agreements had been terminated or abandoned, is not clearly erroneous.

The second element essential to establish an equitable estoppel, as announced in the Gypsy Oil Company case, supra, is that the false representation or concealment must have been with knowledge, actual or constructive, of the real fact.

Appellants had actual knowledge of the fact which was being concealed from Shell—their own view that the Fidelity operating agreements had terminated or been abandoned. They must have entertained this view during all the period from April, 1951, when they received notice of the Shell agreement, to the time this action was filed. This is indicated by the fact that appellants contend that the Shell lawyers should also have come to this view as soon as they read the Fidelity operating

agreements. At the very least, appellants had constructive knowledge of the concealed fact during all of this period, for they then knew all the facts upon the basis of which the claim was later asserted.

The finding, implicit in the findings of fact of the trial court, that the concealment was with knowledge, actual or constructive, of the fact concealed, is not clearly erroneous.

The third element essential to prove equitable estoppel is that the party to whom the false representation is made, or from whom the fact is concealed, must have been without knowledge, or the means of knowledge, of the real facts.

Appellants assert that Shell had actual notice of appellants' claim by reason of the Wight-Gadbois conversations, and the Susan Wight, H. C. Smith, and Cedar Creek communications. This contention has already been disapproved in another connection.

It is further contended, however, that Shell may not claim that it was without knowledge of the true facts unless it used reasonable diligence to learn the truth.[1] Appellants urge that Shell failed to discharge this obligation to ascertain the facts. It is said that representatives of Shell knew all the facts concerning previous activities on the anticline since 1934. They should therefore have known, it is contended, that such activities did not constitute exer-

[1] Thorpe Finance Co. v. LeMire, 264 Wis. 220, 58 N. W. (2d) 641, and Waddell v. School District No. 2, 74 Mont. 51, 238 Pac. 884, are cited in support of this statement.

cise of the option to continue drilling after developing a dry well.

In our view, Shell's duty to inquire as to the facts relative to appellants' claims was discharged when appellants were informed of the Shell agreement. By thereafter remaining silent, appellants lulled Shell into a sense of security, and in effect induced Shell to make no independent inquiry. Under these circumstances, Shell is not chargeable with knowledge which might have been gained had such an inquiry been made.

The implicit finding of fact to the effect that Shell was without knowledge or the means of knowledge of the real facts concerning appellants' claims is not clearly erroneous.

The fourth element essential to prove equitable estoppel is that the false representation must have been made, or the fact concealed, with the intention of inducing action which would not otherwise be taken. Such intention may be proved by circumstantial evidence. Lacy v. Wozencraft, 188 Okla. 19, 105 P. (2d) 781.

Appellants argue that intention of that kind on their part in this case is negatived by the Wight-Gadbois conversations and the Smith and Cedar Creek notices. We have already indicated our reasons for believing that the trial court was entitled to disregard this evidence.

Each of the appellants was advised by letter dated April 27, 1951, of the Shell-Fidelity agreement, and

that Shell would commence a deep well within ninety days. Appellants' silence after receiving this notice warrants the conclusion that appellants intended Shell to proceed on the assumption that appellants had no objections.

The implied finding of fact, that appellants concealed the facts with the intention of inducing Shell to proceed with the development work, is not clearly erroneous.

The fifth and final essential element to prove equitable estoppel is that the party to whom the false representation was made, or from whom the fact was concealed, acted to his prejudice in reliance upon such representation, or upon the nonexistence of the facts concealed.

The trial court found, in effect, that appellants' concealment of the facts concerning their claim that the Fidelity operating agreements were no longer in effect induced Shell to incur substantial expense in proceeding with work under the Fidelity-Shell agreement.

Challenging this finding, appellants first point to the lack of direct evidence as to such reliance. There is no direct testimony, appellants say, that Shell would not have made its agreement with Montana-Dakota and Fidelity, or that it would not have gone ahead with the drilling on the anticline, if, in fact, the Fidelity operating agreements had expired as to the lands here involved. The failure of Shell to call a witness who would give direct testimony as

to reliance, appellants also urge, gives rise to the inference that any such testimony would have been unfavorable to appellees.

As in the case of any other issue, the fact of reliance may be proved by circumstantial evidence.[1] A course of action pursued after exposure to a false representation, or after being deceived by a concealed fact, may be better evidence of reliance than a self-serving statement that one did rely. Where such circumstantial evidence is sufficient, the failure to produce a witness to make such a self-serving statement is of no importance.

Here, the circumstantial evidence tending to prove reliance, as accepted by the trial court and reflected in the findings of fact summarized above, is ample. It establishes that the Cedar Creek anticline is a single geological structure, and that over ninety per cent of the lands therein were committed to the Fidelity operating agreements. Shell, in undertaking the development of the anticline, relied upon the continued effectiveness of these agreements. It cannot reasonably be said that reliance was placed on some of these agreements, but not on all of them. Hence, it is futile to speculate as to what Shell would have done had it known in advance, or at any time thereafter, that any particular percentage of the presumably committed lands were actually not included. Not what Shell might

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[1] May v. City of Kearney, 145 Neb. 475, 17 N. W. (2d) 448; Hetchler v. American Life Ins. Co., 266 Mich 505, 254 N. W. 221; Ste. Marie v. Wells, 93 Vt. 398, 108 Atl. 270.

have done, but what it did do, is the test of reliance.

As against this circumstantial evidence of actual reliance, appellants call attention to items of testimony which, in their view, indicate lack of reliance. In this connection, appellants note that Shell did no drilling in Unit 5 of the anticline, in which appellants' lands were situated. Most of the wells drilled by Shell were many miles from that unit. All the wells drilled in Unit 5 before Shell entered the picture had turned out dry. Appellants' acreage did not exceed three per cent of the total area covered by the Fidelity-Shell agreement.

The evidence indicates further, however, that Shell was following a definite pattern of drilling, for the purpose of progressively extending the producing limits towards and upon the lands in Unit 5. That previous drilling on Unit 5 had proved unrewarding does not indicate lack of interest in that unit, in the face of the fact that this unit was included in the Fidelity-Shell agreement. Nor does the fact that appellants' permits and leases represented a small part of the total project, percentage-wise, negative reliance. Their forty-five hundred acres, while only three per cent of the lands committed to the development, may prove to be an extremely valuable part of the whole. The fact that this suit was brought is some evidence that appellants have a high regard for the oil prospects of their lands. There is no reason why Shell should be credited with less perception.

Appellants call attention to some other items of evidence which, in their opinion, negative a finding of reliance. All of these have been examined, but have been found to afford, singly or collectively, no basis for overturning the findings of fact on this point.

Appellants argue that, having entered into the agreement with Fidelity, Shell was committed to the development program and was legally obliged to continue as to all but Unit 5 lands. Since no work had yet been done on Unit 5 lands, so this argument goes, Shell has done nothing it was not obliged to do, and hence has not relied, to its prejudice, on the commitment of appellants' lands to the project.

The work already performed, as the evidence shows, accords with a systematic plan for the development of the entire anticline. The expenditure of substantial sums in pursuing the pattern of general development will ultimately benefit Unit 5, for it makes development of that unit economically feasible. This benefit which appellants have received is to be compared to the detriment Shell would suffer if the lands in question were now withdrawn from the project. It is this which would prejudice Shell if appellants prevail here. It is a prejudice which would be sustained whether or not Shell could then legally withdraw from the entire project, and whether or not it would withdraw if it could.

The finding of fact as to the element of reliance is not clearly erroneous.

The judgment is therefore sustainable upon the doctrine of equitable estoppel. This was the principal basis of the trial court's decision.

In our view, however, the judgment is also sustainable on the ground that appellants failed to prove that the subleases had expired. Appellants, as plaintiffs in this quiet-title action, had the burden of proving that the documents under which appellees claim, concededly valid at their inception, were no longer in effect. They sought to do this by proving that, after completing a dry well, appellees did not exercise their option to do further drilling within the time specified in section 4 of the Fidelity operating agreements. Under that provision, further drilling was to be prosecuted within the time dictated by good oil-field practice in a wildcat area.

Appellants therefore had the burden of proving what constitutes good oil-field practice, under such circumstances, in a wildcat area, and that appellees did not conform thereto in the timing of exploratory operations. Appellants failed to maintain this burden. The trial court held that there is no evidence in the record as to what constitutes good oil-field practice, under the circumstances in a wildcat area. The court believed that it would therefore be necessary to reopen the case for the taking of further evidence if the case were to be decided on this issue. As indicated above, however, the lack of such

evidence actually constitutes a failure of proof concerning an allegation indispensable to appellants' case. Appellants were not entitled to another opportunity to submit proof on this issue.

Affirmed.

(Endorsed:) Opinion. Filed Oct. 22, 1957.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR CREEK OIL AND GAS COMPANY, a corporation, INTERNATIONAL TRUST COMPANY, a corporation, H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY,

Appellants,

vs.

FIDELITY GAS COMPANY, a corporation, MONTANA-DAKOTA UTILITIES COMPANY, a corporation, and SHELL OIL COMPANY, a corporation,

Appellees.

No. 15,293

Dec. 12, 1957

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

Before: Healy, Fee, and Hamley, Circuit Judges

It is ORDERED that the words and figures, "on February 2, 1953," at the end of page five of the opinion be stricken, and that a period be placed after the immediately preceding word "action," followed by the insertion of the following paragraph:

> "The record before us does not contain the original complaint, and does not show on what date it was filed. The alias summons, however, was filed on February 2, 1953, and the petition for removal and findings of fact recite that the action was filed on or about February 2, 1953.

This same information is conveyed in appellants' opening brief at seven different places. In their reply brief, however, it is recited that the suit was commenced on December 3, 1953, and that the amended complaint was filed on February 2, 1953."

It is FURTHER ORDERED that in the fourth and fifth lines of the second paragraph on page nine of the opinion, the words and figures, "on February 2, 1953," be stricken.

It is FURTHER ORDERED that the petition for rehearing be denied.

(Endorsed:) Order on Peition for Rehearing. Filed Dec. 12, 1957. Paul P. O'Brien, Clerk.

OPERATING AGREEMENT

3. Second party hereby agrees that as soon as practicable after the execution of this agreement and delivery by first party to second party of satisfactory evidences of merchantable title to first party's lands, it will conduct a geological examination of the Cedar Creek anticline, wherein said lands are located, for the purpose of determining a location deemed favorable for drilling a well to test said structure for oil and/or gas. Said well may be located upon said lands, or upon any other lands located upon said structure. Second party will commence drilling operations for drilling such well within one year from the date of execution of operating agreements by the owners or lessees of lands within that area of the Cedar Creek anticline,

located south of the north line of Section Thirty-six (36), Township Six (6) North, Range Sixty (60) East, now or formerly owned or controlled by Gas Development Company, Miller & Kennedy, D. J. Carter, Menarch Gas Corporation, or Messrs. Rehnke, McDonald and Vandervort, and George Norbeck and Norbeck Co. Said test well shall be drilled to a depth of sixty-five hundred feet, unless oil of commercial quality and quantity shall be discovered at a lesser depth, but below two thousand feet, or unless the Madison Lime Formation shall be encountered at a lesser depth. If such test well shall result in the discovery of natural gas of commercial quality and quantity at a lesser depth than 6,500 feet or above the Madison Lime Formation, such may be completed as a gas well, at second party's option, and i nthat event a new test well for oil shall be drilled as soon thereafter as practicable. If said well shall be drilled into the Madison Lime Formation for a distance of one hundred feet without encountering commercial production, or if mechanical difficulties are encountered, which make further drilling impossible, or if formations are encountered which indicate to geologists of second party that further drilling would be futile, said well may be abandoned.

4. After completion or abandonment of said test well, second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall

be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having due regard to weather and road conditions. In the event that under customary oil field practice in prospecting a wild cat area, second party shall be unable to commence the drilling of a new test well before September first of any year, the commencement of any such well may be deferred, at the option of second party, until the following first day of April.